

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-2038

To be argued by
PETER NOEL DUHAMEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2038

JEAN CLAUDE PINTO, a k a
"RICHARD BEN SADOUN",

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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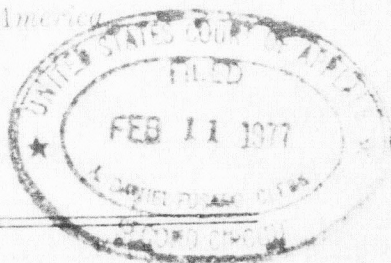


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
ARGUMENT:	
The District Court Properly Denied Pinto's Petition Without a Hearing	6
CONCLUSION	8

TABLE OF CASES

<i>Sunal v. Large</i> , 332 U.S. 174, 178 (1947)	7
<i>Trotter v. United States</i> , 359 F.2d 419 (2d Cir. 1966)	6
<i>United States v. Calabro</i> , 467 F.2d 973, 981 (2d Cir. 1972), <i>cert. denied</i> , 410 U.S. 926 (1973)	7
<i>United States v. Chestnut</i> , 533 F.2d 40, 45 (2d Cir. 1976)	7
<i>United States v. Hutcheson</i> , 312 U.S. 219, 299 (1941)	7
<i>United States v. Rivera</i> , 513 F.2d 519, 533 n.21 (2d Cir. 1975)	7
<i>United States v. West</i> , 494 F.2d 1314 (2d Cir.), <i>cert. denied</i> , 419 U.S. 899 (1974)	7
<i>United States v. Wright</i> , 524 F.2d 1100, 1101-02 (2d Cir. 1975)	7

	PAGE
<i>Statutes:</i>	
Fed. Rules Crim. Proc. Rule 7(c) (1)	7
Fed. Rules Crim. Proc. Rule 7(c) (3)	7
21 United States Code § 812	2, 4
21 United States Code § 841 (a) (1)	2, 4
21 United States Code § 841 (b) (1) (A)	2, 4
21 United States Code § 846	2
21 United States Code § 963	2
28 United States Code § 2255	1, 4
28 United States Code § 2256	7

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Docket No. 76-2038

JEAN CLAUDE PINTO, a/k/a
"Richard Ben Sadoun",

Appellant,

—v.—

UNITED STATES OF AMERICA,

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Jean Claude Pinto, a/k/a "Richard Ben Sadoun", appeals from an order entered on June 25, 1975, in the United States District Court for the Southern District of New York by the Honorable Lawrence W. Pierce, United States District Judge, denying Pinto's motion, pursuant to Title 28, United States Code, Section 2255, to vacate his judgment of conviction and sentence. By order entered on December 30, 1975, Judge Pierce denied Pinto's motion for rehearing and related relief, from which order Pinto similarly appeals.

Indictment 72 Cr. 628, containing two counts, was filed on May 22, 1972. Count One charged Pinto and four other defendants (together with two unindicted co-conspirators) with conspiracy to import, distribute and

possess with intent to distribute approximately one-eighth of a ton of heroin in violation of Title 21, United States Code, Sections 846 and 963. Count Two charged Pinto and the other defendants with possession with intent to distribute approximately one and one-half kilograms of heroin in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

Trial commenced on October 18, 1972, and continued until November 18, 1972, when the jury returned verdicts of guilty as to the five defendants on each count. On January 10, 1973, Pinto was sentenced to consecutive terms of imprisonment of 15 years on Count One and 10 years on Count Two, and a special parole term of 3 years. This Court affirmed the conviction, 486 F.2d 333 (2d Cir. 1973), and the Supreme Court denied Pinto's petition for *certiorari*. 416 U.S. 940 (1974).

On May 23, 1974, Pinto moved to vacate the judgment against him, which petition was denied by Judge Pierce by an Endorsement Order dated June 25, 1975. In a Memorandum Opinion filed December 30, 1975, Judge Pierce denied Pinto's petition for rehearing.

Statement of Facts

A. The Government's Case At Trial *

In the Spring of 1972, the Bureau of Narcotics and Dangerous Drugs (BNDD), in conjunction with French and Belgium police authorities, conducted an investigation in Europe and the United States of an international narcotics conspiracy that culminated in a single seizure

* Since the facts at trial are not directly relevant to this appeal, they are presented here in truncated form. They appear at greater length in this Court's opinion. 486 F.2d at 335-37.

of over one-eighth of a ton of pure heroin and the arrest of five defendants, including Pinto, in New York, and two co-conspirators in Paris, France, on May 16, 1972. The conspiracy, centering around a shipment of heroin from France to New York City, began in March and April, 1972, when the European shippers sought to recruit a courier who would be able to smuggle the heroin into the United States. The job of the courier—who turned out to be an undercover agent—was to smuggle the heroin into the United States, place it in a car and abandon the car in front of Bloomingdale's on Third Avenue in New York City. The buyers, three of Pinto's co-defendants, were then to pick up the car with the heroin still in it. The courier, however, was not to take the proceeds of the sale of the heroin back to France, rather, the fourth co-defendant was to wire the money from his bank account in the United States to an account in Switzerland. Finally, the European shippers wanted to have their personal representative, Pinto, oversee the transfer of the heroin and the receipt of the payment of money.

The conspiracy proceeded as planned, except that the transfer of the car occurred under the surveillance of several agents of the BNDD and shortly thereafter all of the defendants were arrested.

Pinto offered no evidence on his own behalf at trial. He and his four co-defendants were convicted of both counts of the indictment.

B. Pinto's Post-Trial Motions

Beginning on May 23, 1974, approximately one and one-half years after his conviction before Judge Pierce, Pinto began filing motions aimed at setting aside his conviction and sentence. The sole argument offered in sup-

port of his initial 2255 motion (A. 19-28)* was that his indictment was fatally defective in that the true bill failed to list certain of the criminal code sections charged in the underlying indictment. From this he argued that the indictment upon which he was charged was never presented to, nor voted on by, the grand jury which returned the true bill. Judge Pierce denied this petition by endorsement.

Subsequently, Pinto petitioned for a rehearing of his original motion, and repeated his allegation that the indictment upon which he was tried was different from that which accompanied the true bill issued by the grand jury. He further argued that he was denied his right to due process of the law when he was not allowed to call, in support of his motion, "any and all . . . witnesses that were connected with the case." This motion was similarly denied.

C. Judge Pierce's Opinions

In response to Pinto's motions, on December 11, 1974, Judge Pierce ordered the unsealing of grand jury records, which he examined *in camera*. (A. 31). On December 31, 1974, Judge Pierce noted that the true bill form in fact indicated that the indictment charged only violations of Title 21, United States Code, Sections 812, 841 (a)(1) and 841(b)(1)(A), and thus directed the Government to submit additional answering papers to explain why the "True Bill" did not enumerate all of the criminal code sections charged in the supporting indictment. (A. 33). On January 31, 1975, having received the Government's response and having had an opportunity to

* Citations to "A." refers to the separate appendix filed by the Government on this appeal.

examine these materials, Judge Pierce concluded that there was no factual issue then before him requiring an evidentiary hearing and, accordingly, he denied Pinto's petition for a writ of *habeas corpus ad testificandum*. By an endorsement order dated June 25, 1975, Judge Pierce denied Pinto's motion to vacate the judgment of conviction and sentence. (A. 45).

Pinto subsequently filed a petition for rehearing and a request for additional relief. In a memorandum opinion and order filed December 30, 1975, Judge Pierce rejected Pinto's claims and denied his motion for rehearing (A. 42). In dismissing Pinto's claim, the Court made reference to the following facts: the docket sheet reflects that the indictment was filed on May 22, 1972; there is no entry reflecting the filing of a superseding indictment; the indictment itself is stamped "FILED MAY 22, 1972" on its first page and on the back of the cover page; and, the very statutory provisions which Pinto claims were included only in the second, substituted, indictment, are set out in the first stamped page of the indictment. The court concluded that these files and records conclusively established that there is no basis in fact for Pinto's allegations, and held that it was therefore unnecessary to refer to the affidavit submitted by the Government of the Assistant United States Attorney responsible for the prosecution of the instant case in which he categorically denied the substitution of a new indictment. He therefore denied Pinto's claims without a hearing. (A. 42).

ARGUMENT

The District Court Properly Denied Pinto's Petition Without a Hearing.

The only issue on this appeal is whether the District Court properly denied Pinto's claim for vacation of his sentence based solely on his claim that the two-count indictment upon which he was tried and convicted had not actually been presented to and voted by a grand jury. Noting that the "True Bill" form accompanying the indictment at the time of its filing only alleged violations of certain of the criminal law sections of which he was accused, Pinto surmises that the Assistant United States Attorney in charge of the case secretly substituted just prior to trial the two-count indictment for a one-count indictment voted by the grand jury.*

Judge Pierce's factual determination was unquestionably correct. As he noted, the docket sheet for the indictment upon which Pinto was tried showed that the indictment was filed on May 22, 1972, and did not show the entry of any superseding indictment (A. 1-5). Furthermore, indictment 72 Cr. 628 was date-stamped "FILED MAY 22, 1972" on both the first page and on the cover page, and the criminal law sections missing from the "True Bill" form were included on that first page (A. 16). In addition, as a matter of common

* The Assistant United States Attorney in charge of the prosecution filed an affidavit categorically denying such a substitution (A. 43). Judge Pierce properly noted in his memorandum opinion that he did not take this denial into consideration in denying Pinto relief without holding a hearing (A. 39). It is important to note, however, that the Government has not and does not concede the accuracy of any of Pinto's claims. See *Trotter v. United States*, 359 F.2d 419 (2d Cir. 1966).

sense, it is utterly inconceivable that the prosecutor could have affected a last-minute change of the indictment. Not only is the original of the indictment kept in the custody of the District Court from the time of its filing by the Grand Jury, but it would be utterly impossible for such a substitution to be made without one of the numerous and experienced defense counsel trying this multi-defendant case having noticed and complained.* Thus, his petition for relief was properly denied.**

* Indeed, the failure of Pinto to raise this point in his direct appeal not only shows the ludicrousness of his claim—since the substitution must have been apparent to his attorney at trial if it occurred—but bars him from seeking relief under 28 U.S.C. § 2256. *Sunal v. Large*, 332 U.S. 174, 178 (1947); *United States v. Wright*, 524 F.2d 1100, 1101-02 (2d Cir. 1975); *United States v. West*, 494 F.2d 1314 (2d Cir.), *cert. denied*, 419 U.S. 899 (1974).

** It should be noted that the absence from the "True Bill" form of indication of certain of the criminal law violations charged against Pinto was clearly an inadvertent omission of no significance. Indeed, the filing of a "True Bill" form is not required by either the Federal Rules of Criminal Procedure or local rules and appears to be merely a local custom. While Rule 7(c)(1) requires that the indictment contain "the official or customary citation of the statute . . . which the defendant is alleged therein to have violated," the indictment in this case did just that. Furthermore, Rule 7(c)(3) provides that an indictment cannot be dismissed for "error in the citation or its omission" unless such error misled "the defendant to his prejudice," see also *United States v. Hutcheson*, 312 U.S. 219, 299 (1941); *United States v. Chestnut*, 533 F.2d 40, 45 (2d Cir. 1976); *United States v. Rivera*, 513 F.2d 519, 533 n.21 (2d Cir. 1975); *United States v. Calabro*, 467 F.2d 973, 981 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973). Not only does the failure of any counsel to raise this issue prior to trial itself demonstrate the lack of any prejudice from the failure to include citation in the "True Bill" form, but such prejudice would be highly unlikely since, unlike the indictment itself, the "True Bill" form remains solely in the custody of the District Court and is not generally available to defense lawyers.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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Southern District of New York,
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PETER NOEL DUHAMEL,
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PND:ka

AFFIDAVIT OF MAILING

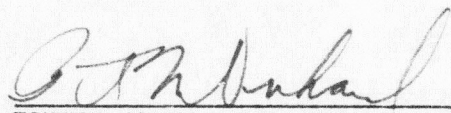
STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

PETER NOEL DUHAMEL being duly sworn,
deposes and says that he is employed in the office
of the United States Attorney for the Southern District
of New York.

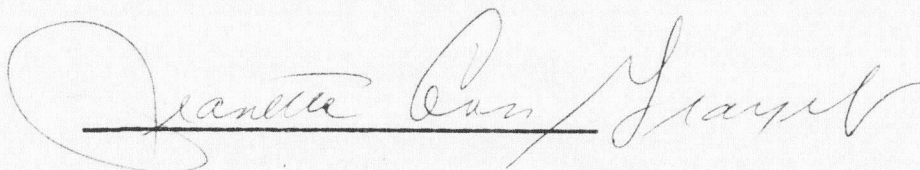
That on the 11th day of February, 1977,
he served a copy of the within Brief
by placing the same in a properly postpaid franked
envelope addressed:

Jean Claude Pinto
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Atlanta, Georgia 30315

An deponent further says that he sealed the said
envelope and placed the same in the mail chute drop for
mailing at One St. Andrew's Plaza, Borought of Manhattan,
City of New York.


PETER NOEL DUHAMEL
Assistant United States Attorney

Sworn to before me this
11th day of February,
1977.



JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977